TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 158. 20

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC T. BELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 22, 1900.

(17,570.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1900.

1 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the supreme court of the State of California, Greeting:

Because of the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court (being the highest court of the State of California in which a decision in the hereinafter-mentioned suit could be had), before you, between The Southern Pacific Railroad Company, plaintiff, and Isaac T. Bell, defendant, wherein was drawn in question, necessarily involved, and passed upon the validity of a statute of and authority exercised under the United States and a title, right, privilege, and immunity specially claimed by the said plaintiff under a statute of and authority exercised under the United States, and wherein it was decided against the title, right, privilege, and immunity claimed by the said plaintiff, manifest error has happened, to the great damage of the said Southern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any has been done, shall be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment should be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the
2 District of Columbia, on or before December 6th, 1899, in the said Supreme Court to be then and there held, to the end that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this October 7th, 1899.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.

The foregoing writ of error is hereby allowed, on this October 17th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that the foregoing writ of error, with a copy thereof for the defendant, was lodged in the office of the clerk of

the said supreme court of the State of California on October 17th, 1899.

Dated and signed on October 20th, 1899.

[Seal Supreme Court of California.]

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California,
By A. W. JOHNSON,
Chief Deputy Clerk.

[10-cent U. S. internal-revenue stamp, canceled Nov. 2, '99. A. W. J.]

3 [Endorsed:] S. F., 1720. In the supreme court of the State of California. Southern Pacific Railroad Co. *vs.* Isaac T. Bell. Writ of error. Filed Oct. 17, 1899. Geo. W. Root, clerk, by A. W. Johnson, deputy.

4 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
ISAAC T. BELL, Respondent.
} San Francisco, No. 1720.

Transcript on appeal.

Wm. Singer, Jr., and H. V. Reardan, attorneys for appellant, San Francisco.

W. B. Wallace, Esq., attorney for respondent, Visalia.

Filed this Dec. 3, 1898, *day of —, A. D. 1898.*
T. H. WARD, *Clerk,*
By R. A. MARSHALL,
Deputy Clerk.

5 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the State of California in and for the County of Fresno.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Complaint.

Complaining of the defendant, the plaintiff alleges:

6 First. That it is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing by and in virtue of the laws of the State of California.

Second. Section 18 of the act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,"

approved July 27th, 1866, authorized and empowered the plaintiff to connect with the Atlantic and Pacific railroad at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco, and to construct a railroad from such point to San Francisco. To aid in the construction of such railroad, the said act granted to the plaintiff every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of the railroad it authorized the plaintiff to construct, whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and the said act further provided, that whenever, prior to said time, any of the said
7 sections were granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands should be selected by the plaintiff in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of the said first-mentioned sections. The said act of July 27th, 1866, as printed in the 14th United States Statutes, at page 292 and following, is referred to and made a part of this complaint.

Third. On or before January 3d, 1867, the plaintiff duly fixed the general route of the entire line of railroad which the said act of July 27th, 1866, authorized it to construct; and on January 3d, 1867, the line of the said railroad was designated by a plat thereof filed on that day in the office of the Commissioner of the General Land Office. The said general route, plat and designation of line were duly approved and accepted by the Commissioner of the General Land Office and Secretary of the Interior, and on March 22d, 1867, the said Commissioner, pursuant to the order of the said Secretary, withdrew all the odd-numbered sections of land lying within thirty miles of the railroad shown upon the said plat, from sale or location, pre-emption or homestead entry; and the said sections have ever since remained so withdrawn, by virtue and force of the
8 said withdrawal, and the provisions of section 6 of the said act. On June 28th, 1870, a joint resolution was adopted by Congress, entitled, "Joint resolution concerning the Southern Pacific Railroad of California," which is printed in the 16th United States Statutes, at page 382 and following, and made a part of this complaint.

Fourth. On or about November 26th, 1866, the plaintiff duly accepted the terms, conditions and impositions of the said act of July 27th, 1866. Thereafter, within the time allowed by law, and prior to November 8th, 1889, the plaintiff duly constructed and equipped the entire railroad provided for in the said act, extending from San Francisco to Tres Pinos, and from Alcalde to the Needles, in seventeen several sections, and along the line designated upon the said plat filed on January 3d, 1867; and prior to the said date,

commissioners duly appointed by the President of the United States for that purpose, duly examined the said railroad as constructed, and duly reported to the President of the United States that the said railroad had been completed in a good, substantial and workmanlike manner, and in all respects as required by the said act, and all such reports except those upon that part of the said road which extends from Mojave to the Needles, were duly accepted and approved by the President of the United States and the Secretary of the Interior. And on and prior to the last-mentioned date the plaintiff filed with the Secretary of the Interior, and the said
9 Secretary duly accepted and approved, a map of each of the said seventeen sections of railroad, as the same had been definitely located and constructed.

Fifth. The S. E. ¼ of section 5, township 23 south, range 23 east, Mount Diablo meridian, containing 160 acres, is a part of an odd-numbered section within twenty miles on one side of the line of railroad shown on the said map filed January 3d, 1867, and within twenty miles on one side of the said railroad as constructed and shown on the said maps of definite location and construction; and all of the said land was granted and otherwise disposed of by the United States, prior to the time when the line of the said railroad was designated by the plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid.

Sixth. The N. E. ¼ of section 7, township 17 south, range 16 east, Mount Diablo meridian, containing 160 acres is situated in the county of Fresno, in the State of California; and is a part of an odd-numbered section distant more than twenty miles from, but lying within thirty miles on one side of, the line of railroad shown on the said map filed January 3d, 1867, and distant more than twenty miles from but lying within thirty miles on one side of the said railroad as constructed, and as shown on the map of
10 definite location and construction thereof. The lands in this paragraph described are opposite to and coterminous with the section of said railroad extending from Huron to Alcalde; the map of definite location and construction of which was filed in the office of, and duly accepted and approved by, the Secretary of the Interior, on or before April 13th, 1889.

Seventh. At the time the said act of July 27th, 1866, was passed, the land described in the 6th paragraph hereof was vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; and the said land has ever since so remained, excepting only as it has been affected by the said act of Congress, the said withdrawals, and the acts of the parties to this suit, herein set forth.

Eighth. The land described in the 6th paragraph hereof is within the district of lands subject of sale and proceedings in the United States land office at Visalia, in the State of California; and a plat of the survey of said land, duly approved by the United States surveyor general, and the Commissioner of the General Land Office, was filed in the said land office on June 10th, 1861. On July 26th,

1893, the plaintiff filed its list No. 66 in the said land office, se-
11 lecting the land described in the 6th paragraph hereof in lieu of the land described in the 5th paragraph hereof. The said list was in the form, and accompanied by the certificates, affidavits, costs and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and the Commissioner of the General Land Office; and by the filing of the same, accompanied as aforesaid, the plaintiff duly selected, under the direction of the Secretary of the Interior, the land described in the 6th paragraph hereof, by and in virtue of the grant and provisions of the said act of July 27th, 1866. The plaintiff had not at the time the said selection was made, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the grant and provisions of the said act; nor has it selected or received any land other than that described in the 6th paragraph hereof, in lieu of the land described in the 5th paragraph hereof.

Ninth. By and in virtue of the provisions of, and the grant made to the plaintiff by the said act of July 27th, 1866, and the matters and things hereinbefore set forth, on July 26th, 1893, the plaintiff became entitled to the issue by the United States of a patent conveying to it the legal title to the land described in the 6th paragraph of this complaint; and the plaintiff at that time, and con-
12 tinuously ever since, duly demanded the issuance of such patent, but the United States, and all officers thereof, have at all times refused to issue the same.

Tenth. Notwithstanding the premises, and wholly disregarding the rights and title of the plaintiff, on or about September 15th, 1892, the United States, without lawful authority, issued and delivered its patent conveying the legal title of the land described in the 6th paragraph hereof, to the defendant; and the defendant claims that the said patent conveyed the legal title of the said land in fee-simple absolute to him, free from any trust for, or obligation to convey the same to, the plaintiff. But, in fact, the said patent conveyed the legal title in trust for the plaintiff, and whoever held the legal title of said land on July 26th, 1893, or at any time since, has held the same in trust for, and under obligation to convey the same to, the plaintiff; and the claims of the defendant to the contrary are pretenses, wholly without right.

Eleventh. After the said patent issued, and prior to the commencement of this suit, the plaintiff duly demanded of the defendant conveyance to it of the title conveyed by the said patent; but the defendant has, at all times, refused the same.

Twelfth. That the defendant at all times had full knowledge of all the matters and things in this complaint set forth.

13 Wherefore, the plaintiff prays the decree of this court that it is the rightful owner of the land described in the 6th paragraph of this complaint; that the defendant holds the legal title of said land in trust for, and requiring him to convey the same to, the

plaintiff, free of all incumbrances; and for such other and further relief as the nature of this case may require—with costs of suit.

WM. SINGER, JR., AND
H. V. REARDAN,
Attorneys for the Plaintiff.

Duly verified.

(Endorsed:) "Filed August 9th, 1897."

(Title of Court and Cause.)

Demurrer.

Now comes defendant and demurs to plaintiff's complaint, and for grounds of demurrer, alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That plaintiff's cause of action, if any it has, is barred by the provisions of section 318, subdivision 4 of section 338, and section 343 of the Code of Civil Procedure of said State.

3. That plaintiff is barred by its laches from obtaining relief herein, in delaying to assert any claim to said land, in delay-
14 ing to file its map of definite location, in delaying its application to select said land, and to commence this action.

Wherefore, defendant prays judgment for his costs herein.

W. B. WALLACE,
Attorney for Defendant.

(Endorsed:) "Filed April 20th, 1898."

(Minute Book, vol. 16, dept. 1, page 218.)

In the Superior Court of the County of Fresno, State of California.

FRESNO, CAL., *July 27th*, 1898.

The court convened.

Present: Hon. E. W. Risley, judge; F. C. Scott, deputy sheriff; Ed. E. Bush, deputy clerk.

Order Sustaining Demurrer.

S. P. R. R. Co.
vs.
ISAAC T. BELL. } No. 7919.

It is ordered that the demurrer of defendant to the complaint of plaintiff be and it is hereby sustained, and said plaintiff is hereby granted ten days in which to amend.

15 (Title of Court and Cause.)

Judgment.

In the above-entitled cause, the demurrer to plaintiff's complaint having been sustained and leave granted to plaintiff to amend, and

plaintiff having made default, and having failed to amend its said complaint within the time allowed by law and order of this court,

It is, by the court, hereby ordered, adjudged and decreed, that plaintiff take nothing by this action, and that defendant have and recover of and from plaintiff his costs in said action, amounting to the sum of — dollars.

Judgment rendered on the 15th day of August, 1898.

E. W. RISLEY,
Superior Judge.

(Endorsed:) "Filed August 15th, 1898."

(Title of Court and Cause.)

Notice of Appeal.

Take notice that the plaintiff above named hereby appeals to the supreme court of the State of California from the judgment of the above-named court rendered and entered in favor of the de-
16 fendant, and against the plaintiff, August 15, 1898, and from the whole thereof.

WM. SINGER, JR., AND
H. V. REARDAN,
Attorneys for Plaintiff.

To W. B. Wallace, Esq., attorney for defendant, and to T. G. Hart, Esq., clerk of the said court.

Dated October 14th, 1898.

(Endorsed:) "Filed Oct. 15, 1898."

(Title of Court and Cause.)

Stipulation.

It is stipulated that the foregoing papers are true and correct copies of the papers contained in the judgment-roll and on file in the office of the clerk of said court, and that the same constitute the transcript on appeal herein.

It is further stipulated that all of the said papers were served and filed in due time.

It is further stipulated that a good and sufficient undertaking on appeal herein has been filed, and may be omitted from this transcript.

W. B. WALLACE,
Attorney for Respondent.

17 Due service of the within by copy is hereby admitted this 19th day of November, 1898.

W. B. WALLACE,
Attorney for Respondent.

I hereby certify that a copy of the within was this 28th day of November, 1898, deposited with me for the judge of the superior court of Fresno county, State of California.

[SEAL.]

T. G. HART,
Clerk of said Superior Court,
By —— ——,
Deputy Clerk.

18 Filed May 26, 1899.

Department One.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
FRANK A. WOOD ET AL., Respondents,

and

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
FREDERICK B. JACK ET AL., Respondents.

} L. A., No. 445.

These cases depend upon the same facts and are submitted together. They involve a contest as to certain lands lying within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, the plaintiff claiming under said grant, and the defendants claiming under patents issued to them as settlers under the land laws of the United States. The defendants demurred to the complaints in both cases, the demurrers were sustained, and these appeals are taken by the plaintiff from the judgments thereupon entered against it.

Said act of Congress, upon which the plaintiff bases its claim to said lands, is entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast." 14 U. S. Stats., 292. Said act incorporated the Atlantic and Pacific Railroad Company, and by the third section granted certain lands to aid in its construction. It provided that where the road passed through the Territories of the United States the odd sections within forty miles of the road, and where it passed through any State ten alternate sections per mile, designated by odd numbers, were granted, making the primary limits within the Territories forty miles, and within the States twenty miles on each side of the road; the grant being of lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and

designated by odd numbers, not more than ten miles beyond the limit of said alternate sections, and not including the reserved numbers."

Section 6 of said act is as follows:

"And be it further enacted: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

Section 18 of said act authorized The Southern Pacific Railroad Company (the appellant here) to connect with said Atlantic and Pacific railroad at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco; "and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

The complaint alleged the substance of said section 18, and referred to said entire act as printed in said statutes, and made it part thereof. It then alleged that before January 3, 1867, plaintiff "fixed the general route" of the entire line of railroad it was authorized to construct, and on that day filed a map thereof in the General Land Office, that the same was approved by the Commissioner, that on March 22, 1867, said Commissioner, pursuant to the order of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within thirty miles of the line of said road as shown upon said map, from sale or location, pre-emption or homestead entry, and that the same have ever since remained so withdrawn; that on June 28, 1870, a joint resolution was passed by Congress (16 Stats., 382) authorizing appellant to construct its road as near as may be on the route indicated by its map of 1867; that prior to November 8, 1889, and within the time allowed by law, it completed its entire road along the line designated by said map, that its road was accepted, and that on and prior to November 8, 1889, it filed with the Secretary of the Interior a map of each of the sections of said road "as the same had been definitely located and constructed," and the same were accepted and approved by said Secretary.

The fifth paragraph of the complaint described certain lands, parts of odd sections within the twenty-mile or place limits, which were lost to it, and the sixth paragraph described the lands now in controversy, which are situated within the indemnity limits de-

scribed in said act, and alleged that they are opposite to and coterminous with the section of said road extending from Huron to Alcalde, "the map of definite location and construction of which was filed in the office of, and duly accepted and approved by, the Secretary of the Interior, on October 8, 1889."

The complaint further alleges that at the time the act of July 27, 1866, was passed the lands here in controversy were vacant and unappropriated public land of the United States, not mineral, and not reserved, etc., and that they have ever since so remained, excepting only as they have been affected by said act of Congress, the said withdrawals, and the acts of the parties to this suit; that said lands were surveyed and plat filed May 1, 1874; that "on October 19, 1891, the plaintiff filed its list No. 44 in said land office, selecting the lands described in the sixth paragraph hereof in lieu of the lands described in the fifth paragraph;" that it thereby became entitled to a patent from the United States to the lands in question; that at that time, and ever since, plaintiff has demanded the issuance of such patent, but the United States and every officer thereof have at all times refused to issue it; that disregarding the rights of the plaintiff, a patent was issued to defendant Wood on October 30, 1888, conveying the legal title to him, that he took the legal title in trust for the plaintiff, that a conveyance has been demanded, etc. The prayer is that plaintiff be adjudged to be the owner, and that defendants convey the title to it.

Defendants' demurrer stated three grounds: 1st. That said complaint does not state facts sufficient to constitute a cause of action. 2nd. That plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338, and sections 318 and 343 of the Code of Civil Procedure; and, 3rd. That plaintiff has been guilty of gross laches in delaying to bring suit after the issuance of the patent to Wood, and after filing its selection.

Appellant, in its brief, states its first point thus: "The facts stated in the second amended complaint show the legal title to be in the plaintiff." If that were true there could be no reason why it should resort to equity to compel a conveyance. But in the complaint it is alleged that the defendants have the "legal title," and, upon the theory that plaintiff has a prior and better right, seeks to compel a conveyance.

Whatever right the plaintiff asserts, or may have, is based upon said act of Congress of 1866, and its own acts thereunder, while defendants' rights are based upon the pre-emption laws of the United States, and their compliance therewith; and, as defendants' patent was issued prior to the selection of the same lands by the plaintiff, they must have the better right if said lands were subject to pre-emption; and that they were so subject, unless withdrawn from pre-emption by the act of 1866, or by executive action thereunder, is not questioned.

Section 6 of said act (above quoted) provides: "And the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act;" but it is further provided that the

pre-emption act of 1841, and the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

If it be true, as contended by the learned counsel for plaintiff, that the "odd sections of land hereby granted" includes the odd sections within the indemnity limits, there could have been no reason for the provision that the homestead and pre-emption laws should extend "to all other lands on the line of said road," since the even-numbered sections were in nowise affected by the grant.

But aside from this provision of the act it is well settled that the words "hereby granted" do not include the odd sections within the indemnity limits, and therefore it cannot be true that upon selection the title relates back to the date of the act. As to lands within the place or primary limits, it is uniformly held that the words "be and is hereby granted" import a grant *in presenti*, and when the lands are ascertained by fixing the line of the road in the manner prescribed in the act, the title of the grantee relates back to the date of the act, but does not attach to lands to which the United States did not have full title at that date, or were otherwise excepted from the operation of the grant, even though they should afterwards be freed from the claim or possession which excluded them under the terms of the grant. Newhall *vs.* Sanger, 92 U. S., 761. But, as to indemnity lands, it is sufficient if they are free from private claim at the time of their selection by the railroad company. Ryan *vs.* Railroad Co., 99 U. S., 382. In Newhall *vs.* Sanger an odd section within the place limits was covered by a Mexican grant which was *sub judice* at the date of the act, but shortly afterward the Mexican grant was adjudged void, and it was held that the land did not pass under the grant to the railroad company. In Ryan *vs.* Railroad Co. the land in question was within the indemnity limits of the grant to the railroad company, and was also covered by a Mexican grant which was afterwards declared void, and was selected by the company as indemnity land, and was afterwards settled upon by Ryan as a pre-emptioner. It was held that the railroad company's selection having been approved by the Secretary of the Interior, it was entitled to the land, and the distinction between that case and Newhall *vs.* Sanger was pointed out, the court saying: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose."

These cases settle the proposition that the lands *granted* by the act are those as to which the grant is *in presenti*, and refer only to the lands within the primary limits; and as to the indemnity lands that the title, when they are selected, does not relate back to the date of the act, but to the date of selection.

In Cedar Rapids, etc., Railroad *vs.* Herring, 110 U. S., 27, the above quotation from Ryan *vs.* Railroad Company was re-
19 peated with approval, and in addition the court said: "It is only when the line and route of the road is definitely fixed

that any right of selection exists. This must necessarily be so, because until then the quantity of land lost cannot be known, and the number of sections to be selected can only then be ascertained." The court also said (p. 38): "It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as had previously been disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection. This latter, unlike the odd-numbered sections within the six-mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public land. They are not and cannot be made specific until the grantee's right of selection has been exercised."

This authority disposes of appellant's contention that the map of the general route, filed in 1867, fixed the limits of the indemnity lands, or operated as a withdrawal of them.

In St. Paul Railroad *vs.* Winona Railroad, 112 U. S., 732, the court said: "It is true that in some cases the statute requires the Land Department to withdraw the land within these secondary limits from the market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company inconsistent with the right of the Government to sell, or of any other company to select, which has the same right of selection within those limits."

If, therefore, it be true, as above stated, that the withdrawal of indemnity lands does not imply a vested right to them in the railroad company, it must be that they are not, and cannot be, included in the term "hereby granted." But Congress itself has placed a construction upon said act of July 27, 1866, or at least recognized the distinction observed by the courts between granted and indemnity lands. In the act passed July 5, 1886 (24 Stats., 123), entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company," etc. (referring to the act here in question), the lands declared forfeited are described thus: "Which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within *both the granted and indemnity limits*, as contemplated to be constructed under and by the provisions of said act of July 27, 1866."

It is argued on behalf of appellant that the grant to it was one of quantity. But this will not bear investigation. It is clear that Congress intended to grant all the odd-numbered sections within twenty miles of the road except those that were excepted from the grant, and the privilege was given the company to select odd sections within an additional ten miles in lieu of those that were lost to it within the primary limit. But Congress did not intend either to grant ten sections on each side of the road unconditionally, or to grant all the odd sections to which the United States had full title,

and which were not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, within the additional ten miles, since if that had been the intention all the unappropriated odd sections within thirty miles of the road would have been granted; and hence the act requires the grantee to select the lieu lands within the indemnity limits to the extent only that lands were lost within the primary limits; and, therefore, the act requires that the selection of indemnity or lieu lands shall be made by the grantee under the direction of the Secretary of the Interior; or, as expressed in some other acts granting lands in aid of railroads, subject to his approval. In either case the Secretary acts judicially. He must determine whether the alleged loss within the primary limits has in fact taken place, and whether the land selected is subject to selection. That the Secretary acts judicially, see Wisconsin Cent. R. Co. *vs.* Price County, 133 U. S., 496; and for a fuller discussion as to his powers, see Knight *vs.* U. S. Land Association, 142 U. S., 161, 176.

The complaint, it is true, alleges that appellant's selection of the land in controversy was under the direction of the Secretary of the Interior; but it is further alleged that plaintiff has demanded that a patent issue to it for said lands, and that the United States and all its officers (which includes the Secretary) have refused to issue it, and that on October 30, 1888, the United States conveyed the legal title to the defendant Wood by a patent then issued to him. The refusal to issue a patent to the plaintiff, though persistently demanded, and the further fact, distinctly alleged, that at a date some three years prior to plaintiff's selection the same land was patented to defendant Wood, is wholly inconsistent with the allegation that the selection was made under the direction of the Secretary of the Interior, and, in effect, is an allegation that the selection was not made under his direction, or approved by that officer. It is said, however, that at the date of the act (July 27, 1866) the United States had then full title, that it was not reserved, sold, granted or otherwise appropriated, and was free from pre-emption or other claims or rights; but that was before the plaintiff filed its map of the general route of its road, and said allegation is not made as of any other date than that of the act; nor is the date of defendant's settlement on the land in question alleged *non constat* that it may have been before the alleged withdrawal of the land from sale by the order of the Secretary made in March, 1867, or after its revocation on August 15, 1887. It is true it is further alleged that "said sections have ever since remained so withdrawn by virtue and force of said withdrawal;" but this allegation is a mere conclusion of law that having been once withdrawn it so remains "by virtue and force of said withdrawal," and is not the equivalent of an allegation that the withdrawal had not been revoked, while the allegation that a patent was issued to the defendant shows that, as to the land so conveyed, the withdrawal was revoked. The withdrawal, however, was in fact revoked on August 15, 1887, by executive order after a rule to show cause was served upon the Atlantic and Pacific Company and the Southern Pacific Company, and after each of said companies

had filed answers thereto. For the proceedings and action of the Secretary of the Interior in relation thereto, see 6 Dec. Dep. Int., 77 to 93. This is a public record of which the court takes judicial notice, and such action, being within the power of the Department of the Interior, is conclusive, and might be properly considered even if the complaint had alleged that the withdrawal had not been revoked.

It is said by counsel for appellant that "where all the undisposed of odd sections within the exterior limits of the grant are insufficient to make up the quantity granted, there need be no selection; and by definite location the grantee perfects the same title to the lands within the secondary or indemnity limits as to those in the primary limits;" citing St. P. & Pac. R. Co. *vs.* N. P. R. R. Co., 139 U. S., 19.

As to the first part of this statement the case cited held that, as all the lands within the indemnity limits only made up in part for the deficiencies, there was no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated.

The controversy there was as to the respective rights of two different railroad corporations claiming under different grants the same indemnity lands, and not as to the right of either company to a specific parcel as against a claimant under the homestead or preemption laws; and therefore it was only necessary to determine whether all the odd sections within the indemnity limits were required to indemnify the company having the prior right for its losses within the place limits, these lands having been withdrawn by the Land Department for the benefit of the Northern Pacific Company; and the language used by the court must be read in the light of these facts; and in a later case (United States *vs.* Colton Marble & Lime Co., 146 U. S., 616) the above case (139 U. S., 19) was cited, and the court said: "The ordinary rule with respect to lands within the indemnity limits is that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, *in a contest between two railroad companies*, that no formal selection was necessary to give them to the one having the older grant, as against the other company." But, however that may be, in the case at bar it is not alleged that all the odd sections within the indemnity limits are required to make up appellant's deficiencies within the primary limits, or that there are no other lands available for that purpose than those in controversy.

As to the second branch of appellant's contention, viz: that by the map of definite location the grantee perfects the same title to the indemnity lands as to those within the primary limits, but one case is cited which sustains that contention. That is the case of Railroad Co. *vs.* Barnes, 2 North Dak., 310; 51 N. W., 386, a case which was expressly overruled in Grandin *vs.* La Bar, 3 N. D., 446, 455, in an able opinion to which we refer in support of our conclusions in this case. In that case (page 453) it was said: "But it required something more than the existence of the grant, and the

location and construction of the road in accordance with the terms of the grant, to vest the title to such additional lands in the company. It required a legal selection; and until such selection was made, and the legality of the selection in some manner established, the company could claim no right or interest whatever in any specific tract within the indemnity belt." Citing Ryan *vs.* Railroad Co., 99 U. S., 382; Grinnell *vs.* Railroad Co., 103 U. S., 739; Railroad *vs.* Herring, 110 U. S., 27; Kansas Pac. R. Co. *vs.* Atchison, etc., R. Co., 112 U. S., 414; Wisconsin Cent. R. Co. *vs.* Price County, 133 U. S., 496, and other cases.

In a supplemental brief appellant cites the case of Southern Pac. R. Co. *vs.* Groeck, decided by the circuit court of appeals, ninth circuit, and reported in 87 Fed. Rep., 970. That case arose under the same grant which is the basis of appellant's claim in this case, and in most of its features is entirely similar, and it is urged that as the case before us involves Federal questions, that the decision of the circuit court of appeals should be followed by this court; but I think that the opinion in that case is not sustained by the decisions of the Supreme Court of the United States upon vital questions involved in it, even if it were not distinguishable from the case before us in certain of its features. For example, it is there said: "A careful consideration of other decisions of the Supreme Court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of *the terms of the grant itself* the indemnity lands *are withdrawn* from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than a mere right to initiate a title by selection, and that the lands in the indemnity limits are as truly *granted lands*, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted." Citing St. Paul & S. C. R. Co. *vs.* Winona & St. P. R. Co., 112 U. S., 720, and St. Paul & P. R. Co. *vs.* Northern Pac. Co., 139 U. S., 1. (The italics are ours.)

The latter case has been already noticed, and the facts which make it broadly distinguishable from the Groeck case, and the one at bar, need not be repeated. In St. Paul Railroad *vs.* Winona Railroad, the controversy arose under a grant to the Territory of Minnesota for the benefit of several roads, both parties claiming under the same grant, and it was held that title to the lands within the primary limits relates, after the road is located according to law, to the date of the grant, while as to indemnity lands neither priority of grant, nor priority of location or of construction, gives priority of right, but this is determined by priority of selection, where the selection is made according to law. In the opinion (p. 732) the court said:

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?"

In Barney *vs.* Winona Railroad Co., 117 U. S., 232, Mr. Justice Field, after noticing "the well-established distinction observed between *granted* lands and *indemnity* lands," said: "It is these 'granted lands' of the prior grant falling within the six-mile limit that in our opinion are reserved, and not the possible indemnity lands which might be subsequently acquired."

The case of Buttz *vs.* Northern Pac. Railroad, 119 U. S., 55, cited by the court of appeals in the Groeck case, has no application to that case or this. There the controversy related solely to lands within the primary limits of the grant, which in that case was of all the odd sections within forty miles on each side of the road, and all of which were withdrawn by the statute from sale or preemption.

In the case of Northern Pac. Railroad *vs.* Musser Sauntry Co., 168 U. S., 604, also cited in the Groeck case, the sole question was "whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff," which was made after the withdrawal; and it was held that the act of the Secretary withdrawing the lands from settlement was in effect a reservation within the terms of the later grant to the plaintiff and excepted them therefrom; but this does not support the holding in the Groeck case that the terms of the grant here under consideration operates of itself to withdraw the indemnity lands from settlement "from the moment when a map of the general route is made and filed," or that "the lands in the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits."

In support of the same proposition, viz: that the grant itself withdraws the lands within the indemnity limits, the circuit court of appeals also quoted from United States *vs.* Southern Pacific Co., 146 U. S., 600, the following:

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing a map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve

the land for the company to which in aid of the construction of the road it is granted."

This, however, was not the language of Mr. Justice Brewer, but was quoted from Buttz *vs.* Northern Pac. R. Co., 119 U. S., 71, 72, where the primary or place limits were forty miles on each side of the road, and had no reference to indemnity lands; nor did the case of United States *vs.* Southern Pac. Company have any reference to indemnity lands, but, as shown by the statement of facts, "the lands in controversy are within the granted or place limits of both the Atlantic and Pacific and the Southern Pacific Companies at the place where these lines cross;" and it was this fact that made the quotation from the Buttz case applicable.

The case of Van Wyck *vs.* Knevals, 106 U. S., 360, cited by appellant, has no application here. In the statement of facts it is said: "The lands in dispute are within ten miles of the road as built and of the line as delineated on the map." They were in the place limits, and not indemnity lands.

In the Groeck case the court said: "After such lands have been once set aside by congressional act no authority is vested in the Secretary of the Interior, or in any officer of the Land Department, to restore them or open them to settlement." That is conceded; but it is clear that the indemnity lands were not set aside by "congressional act." As to the lands within the *place limits* section 6 of the act provided that "the odd sections of land *hereby granted* shall not be liable to sale or entry," except by the company; but the same section further provided that the homestead and pre-emption laws "*shall be*, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

It has been often decided, as we have seen, that the words "hereby granted" import a grant *in presenti*, which vests the title in the grantee as of the date of the grant. The expression "all other lands" must therefore include the indemnity lands, the title to which, when selected and approved, relates to the date of selection; and as to these lands the pre-emption and homestead laws were expressly extended. The only debatable question, therefore, is whether the Land Department had authority to withdraw said indemnity lands from settlement; and upon this question Mr. Secretary Lamar expressed the opinion that the act deprived the department of that power. See 6 Dec. Dep. Int., pp. 87 to 91. But it is not necessary to a decision of the present case to decide that question, for as these lands were not withdrawn by force of the act of Congress, and the withdrawal having been revoked, and as the complaint does not allege that Wood's settlement was made before the revocation, or while they were withdrawn, it is not shown that his settlement was illegal or unauthorized, or that the patent was improperly issued.

In a supplemental brief, filed by respondent, our attention is called to the case of Moore *vs.* Cormode, decided by the supreme court of Washington December 5, 1898 (55 Pac. Rep., 217). That case arose under the grant to the Northern Pacific railroad, the language as to the indemnity lands being the same as in the grant

to the appellant, and the general facts being the same as here. The plaintiff was the grantee of the railroad company, and the action was brought to cancel defendants' patent, and to obtain possession.

We should like to quote largely from the opinion, but must content ourselves with a single sentence:

"After a consideration of the numerous cases cited in the briefs, we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement."

In view of the conclusion reached upon the first ground of demurrer it is not necessary to consider either the second or third grounds.

I advise that the judgment appealed from be affirmed.

HAYNES, *C.*

We concur:
BRITT, *C.*
GRAY, *C.*

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

GAROUTTE, *J.*
VAN DYKE, *J.*
HARRISON, *J.*

21 Appeal from superior court of Fresno county.

For appellant, Wm. Singer, Jr., and H. V. Reardon.
For respondent, W. B. Wallace.

Filed August 2, 1899.

In Bank.

SOUTHERN PACIFIC RAILROAD CO., Appellant, *vs.* ISAAC T. BELL, Respondent. } S. F., No. 1720.

By the COURT:

On the authority of Southern Pacific Co. *vs.* Wood, 57 Pac. Rep., 388, the judgment in this case is affirmed.

22 In the Supreme Court of the State of California. Bank.

SOUTHERN PACIFIC COMPANY, Appellant, *vs.* ISAAC T. BELL, Respondent. } S. F., No. 1720. On Appeal from the Superior Court in and for the County of Fresno.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Fresno in the above-entitled cause be, and the same is hereby, affirmed.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 2nd day of August, 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 2nd day of September, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON,
Chief Deputy.

23 [Endorsed:] S. F., No. 1720. In the supreme court, State of California. Remittitur. Southern Pacific Co. *vs.* Bell. Clerk's costs, $—; paid by appellant, $10.00; paid by respondent, $—. Total, $10.00. Geo. W. Root, clerk, by A. W. Johnson, deputy.

24 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Assignment of Errors.

The plaintiff, by its attorney and counsel, in connection with its petition for writ of error herein, says that the judgment and decree of the supreme court of the State of California rendered in the above-entitled cause is erroneous and against its just rights in the following particulars:

I.

The court erred in (*a*) sustaining the defendant's demurrer to the plaintiff's complaint, (*b*) adjudging that the plaintiff take nothing, and (*c*) adjudging that the defendant have and recover his costs from plaintiff.

II.

The court erred in not holding and adjudging:

1st. That the act of Congress approved on July 27th, 1866, referred to in the plaintiff's complaint, granted unto the plaintiff an equitable interest in the land sought to be recovered by the plaintiff from the defendant, and herein that the legal title (if any) conveyed by the United States to the defendant is subordinate to and
25 subject to the control of the plaintiff's equitable right.

2nd. That by the self-operating force of the said act of July 27th, 1866, the land sought to be recovered by the plaintiff from the defendant was reserved for the exclusive benefit of and to satisfy the grant made *made* by that act to the plaintiff; which reservation

took effect on January 3rd, 1867, when the plaintiff's map of general route was filed with and accepted by the Secretary of the Interior, and has remained in force since that date continuously.

3rd. That Congress, by its joint resolution, approved on June 28th, 1870, referred to in the plaintiff's complaint, ratified and confirmed the grant made to plaintiff by the said act of July 27th, 1866, along the line designated by the said plat of January 3rd, 1867.

4th. That the land sought to be recovered has at all times since January 3rd, 1867, remained withdrawn from the public domain for the exclusive benefit of the plaintiff's said grant, and that at all times since that date the land officers of the United States have remained wholly without authority or power to release such withdrawal or dispose of the said land otherwise than to the plaintiff.

5th. That the plaintiff became entitled to a patent from the United States for the land in suit upon its selection thereof on July 26th, 1893, and whosoever at that time held the legal title
26 for said land held it in trust for and under obligation to convey the same to the plaintiff.

6th. That the patent issued by the United States to the defendant, referred to in the plaintiff's complaint, was and is a conveyance to the defendant in trust for the plaintiff, and the defendant must convey to the plaintiff such title as he received by that patent free of incumberance.

III.

The court erred in assuming and holding, against the express allegations of the plaintiff's complaint to the contrary:

1st. That the "defendant's rights are based on the pre-emption laws of the United States and compliance therewith."

2nd. That "it is said, however, that at the date of the act (July 27, 1866), the United States had full title; that it was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights; but that was before the plaintiff filed its map of the general route of its road, and said allegation is not made as of any other date than that of the act."

3rd. That the plaintiff's selection of the land in suit was not made under direction of the Secretary of the Interior.

IV.

The court erred in holding and deciding:

1st. That the words "hereby granted," as used in the act of Congress approved on July 27th, 1866, referred to in the plaintiff's complaint, "do not include the odd sections within the indemnity limits."

2nd. That the land in suit was subject to pre-emption entry or sale after filing of the plaintiff's general route map on January 3rd, 1867.

27 3rd. That the said land was subject to any claim or right of the defendant at any or either of the times when the

plaintiff's grant was made, the plaintiff's general route map filed, the plaintiff's road definitely located, the plaintiff's selection made, or the said suit commenced.

4th. That the plaintiff at any time had or claimed any right, title, or interest in or to the land in suit, except such as arose out of and originated with the patent referred to in the plaintiff's complaint.

5th. That the patent referred to in the plaintiff's complaint conveyed unto the defendant any title to the said land for himself or otherwise than in trust for the plaintiff.

The plaintiff prays that the said judgment and decree be reversed, and that the mandate of the United States Supreme Court issue, directing judgment and decree for plaintiff, as prayed in its complaint.

H. V. REARDAN,
Attorney for Plaintiff.

WM. SINGER, JR.,
Counsel for Plaintiff.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy.

28 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Petition for Writ of Error.

To the Honorable W. H. Beatty, chief justice of the supreme court of the State of California:

It is most respectfully shown that your petitioner, The Southern Pacific Railroad Company, as plaintiff, brought the above-entitled suit against Isaac T. Bell, as defendant, in the superior court of the State of California in and for the county of Fresno, by filing its complaint therein on August 9th, 1897; on April 20th, 1898, the defendant filed his demurrer to the plaintiff's said complaint; on July 27th, 1898, after argument and consideration thereof, the said superior court made its order sustaining the said demurrer and allowing the plaintiff ten days within which to amend its said complaint, and on August 15th, 1898, the plaintiff having refused to amend its said complaint, the said superior court rendered its judgment ordering, adjudging, and decreeing that the plaintiff take nothing by its said suit or action, and that the defendant have and recover his costs from plaintiff.

On October 14th, 1898, within the time allowed by law therefor, the plaintiff duly appealed to this court from the said judg-
29 ment, order, and decree; and on August 2nd, 1899, after argument and consideration, this court affirmed the said judgment, order, and decree of the superior court.

In the said suit or action the plaintiff specially claimed a title, right, privilige, immunity, and authority exercised under a statute of the United States, and by the said suit or action, the proceedings therein, and the final judgment and decree of this court there was drawn in question, necessarily involved, and passed upon the validity of a statute of and authority exercised under the United States, where a title, right, privilige, and immunity was specially claimed by the plaintiff under a statute of and authority exercised under the United States and the decision of this court was and is against the title, right, privilege, and immunity specially set forth and claimed by the plaintiff under such statute and authority.

The plaintiff, Southern Pacific Railroad Company, being dissatisfied with the said judgment, order, and decree made by the superior court in this suit or action, and with the judgment, order, and decree of this court affirming the same, and feeling aggrieved thereby, most respectfully prays that it be allowed to prosecute a writ of error herein to the Supreme Court of the United States in pursuance of the laws of the United States in that behalf made and provided.

H. V. REARDAN,
Attorney for Plaintiff.

WM. SINGER, JR.,
Counsel for Plaintiff.

30 The foregoing petition is allowed, a supersedeas bond in the sum of $500 to be filed by the petitioner.

Sixth October *6th*, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy clerk.

31 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Bond.

We, J. Kruttschnitt and F. S. Douty, of the city and county of San Mateo, State of California, are held and firmly bound unto Isaac T. Bell in the sum of five hundred (500) dollars, to be paid to him, his heirs, executors, or administrators; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The Southern Pacific Railroad Company, plaintiff above named, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled court and cause, and the condition of this obligation is that

if the Southern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force.

Dated, signed, and sealed on October 6th, 1899.

J. KRUTTSCHNITT. [SEAL.]
F. S. DOUTY. [SEAL.]

32 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. Kruttschnitt and F. S. Douty, being duly sworn, each and for himself, says:

I am one of the sureties to the foregoing bond and subscribed my name thereto. I am a resident and freeholder of the State of California, and am worth the sum of five hundred dollars, over and above all my just debts and liabilities, in property situated in the State of California which is not exempt from execution.

J. KRUTTSCHNITT.
F. S. DOUTY.

Subscribed and sworn to before me on October sixth (6th), 1899.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond approved on October 6th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy clerk.

33 UNITED STATES OF AMERICA, ss:

To Isaac T. Bell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, District of Columbia, on December 6th, 1899, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of California, wherein The Southern Pacific Railroad Company, plaintiff, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the — plaintiff in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, on this October 17th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Service of the foregoing citation is admitted on October 19, 1899.

W. B. WALLACE,
M. K. HARRIS,
Attorney- for Defendant in Error.

34 [Endorsed:] S. F., 1720. In the supreme court of the State of California. Southern Pacific Railroad Co. *vs.* Isaac T. Bell. Citation. Filed Oct. 30, 1899. Geo. W. Root, clerk, by A. W. Johnson, deputy.

35 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
ISAAC T. BELL, Respondent.
} S. F., 1720.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript, opinion in L. A., 445, So. Pac. Co. *v.* Wood; opinion in S. F., 1720, So. Pac. Co. *v.* Bell; judgment, assignment of error, petition for writ of error, bond, original citation, and original writ of error, and the same constitute the papers on writ of error, pages 1 to 31, inclusive, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 2nd day of November, A. D. 1899.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON,
Chief Deputy.

[10-cent U. S. internal-revenue stamp, canceled Nov. 2, '99. A. W. J.]

[Endorsed:] S. F., No. 1720. In the supreme court, State of California. Southern Pacific Railroad Company *vs.* Isaac T. Bell.

Endorsed on cover: File No., 17,570. California supreme court. Term No., 158. The Southern Pacific Railroad Company, plaintiff in error, *vs.* Isaac T. Bell. Filed November 22d, 1899.